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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RAYMOND J. RUBLE,
also known as "R.J. Ruble"

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

At all times relevant to this case, Petitioner Raymond J. Ruble ("Ruble"), a tax lawyer, was a partner in the prominent law firm of Brown & Wood, later Sidley Austin Brown & Wood. In that capacity, among other duties, Ruble wrote opinion letters opining as to the validity of tax benefits derived from certain transactions, concluding that it was "more likely than not" that if the tax benefits were challenged by the Internal Revenue Service, a Court would uphold the tax treatment at issue. The major accounting firm of KPMG also wrote opinion letters endorsing the tax benefits derived from these transactions. The government disagreed with Ruble's tax opinions. Instead of contesting the tax issues through the normal processes of audit, civil assessment, and civil litigation in Tax Court or the District Court, the government filed numerous charges of criminal tax evasion against Ruble, as well as numerous partners and former partners at KPMG. The government's theory was that the tax benefits were invalid because the transactions at issue lacked the vague and inconsistently-applied doctrine of "economic substance" frequently raised by the government in tax cases involving complex transactions, such as those at issue here. Because Ruble's opinion letters reached a contrary conclusion on the issue of economic substance, the government indicted Ruble for criminal tax evasion in violation of 26 U.S.C. §7201. Following a trial, a jury convicted Ruble on these counts and the United States Court of Appeals for the Second Circuit affirmed.

The Second Circuit's affirmance of Ruble's conviction presents three questions meriting review:

1. Whether a criminal defendant can be guilty of tax evasion where the governing tax law is objectively unclear. *Cheek v. United States*, 498 U.S. 192 (1991).

2. Whether Ruble could legally be convicted of tax evasion under 26 U.S.C. §7201 where his conduct consisted largely of the drafting of opinion letters and was remote from the preparation of the tax returns of the taxpayers at issue.

3. Whether the Second Circuit deviated from well-established law by upholding Ruble's conviction in spite of the fact that the evidence failed to establish that Ruble knew that the tax transactions at issue lacked economic substance, no matter how that vague concept is defined.

PARTIES TO THIS PROCEEDING

In addition to the parties shown in the caption, John Larson ("Larson") and Robert Pfaff ("Pfaff") were also defendants-appellants below. They are filing a separate petition for a writ of certiorari.

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OPINION BELOW

The Second Circuit's opinion is not reported. The Second Circuit initially affirmed Ruble's conviction, as well as those of the co-appellants, in a summary order dated August 27, 2010 which did not even mention the specific appellate issues Ruble had raised. After Ruble filed a petition for rehearing, the Second Circuit issued an "Amended Summary Order" dated October 26, 2010 again affirming the convictions and giving a brief explanation of its reasons for doing so as to Ruble (App. 1a). All of the necessary opinions have been printed in the petition being filed by Larson and Pfaff.

JURISDICTION

The Second Circuit denied rehearing on November 22, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

26 U.S.C. §7201 and the Due Process Clause of the Fifth Amendment are involved in this case.

STATEMENT OF THE CASE

A more comprehensive statement of the case is presented in the petition filed by co-appellants below Larson and Pfaff. We respectfully invite the Court's attention to that petition for a more detailed statement of the case. The following sets forth a statement of the case pertinent to Ruble.

Factual Background

Ruble is a prominent tax attorney and has been a partner at several major New York law firms. During the period of time relevant to this case, Ruble was a partner in the firm of Brown & Wood, later Sidley Austin Brown & Wood.

This case involved the design and promotion of "tax shelters" by the international accounting firm of KPMG. Although the term "tax shelter" often has derogatory connotations, tax shelters are not necessarily illegal and are in many respects perfectly appropriate under the Internal Revenue Code.

Personnel at KPMG designed the tax shelter transactions on behalf of wealthy clients seeking to reduce tax liability. In varying ways, the transactions all involved a "basis shift", namely, an investment transaction resulting in the creation of an asset held by the taxpayer having a high "basis" for tax purposes, which the taxpayer could then dispose of in order to generate a deductible tax loss. In addition to designing the tax shelters, KPMG also wrote opinion letters for its clients, supporting the favorable tax treatment resulting from the transactions and opining that it was "more likely than not" that a court would rule favorably on the tax treatment of the transactions. Clients who acted in reliance upon KPMG's opinion letters could seek to avoid liability for civil tax penalties, even assuming that the Internal Revenue Service audited the taxpayers and disallowed the tax benefits resulting from the transactions.

Two of the KPMG personnel who had worked on these tax shelter transactions, Larson and Pfaff, left

KPMG in 1997 and formed Presidio Advisors LLC ("Presidio"). Presidio continued to work closely with KPMG in connection with the transactions, and it made arrangements for the implementation of the numerous financial transactions that were components of the tax shelters.

Ruble's involvement in the case was two-fold. First, Ruble worked with KPMG personnel in designing some of the tax shelters in order to satisfy certain requirements of the Internal Revenue Code. Second, Ruble wrote concurring "second opinions" on behalf of his law firm opining that it was "more likely than not" that a court would uphold the tax treatment of the transactions if challenged by the IRS. KPMG supplied these second opinions to its clients. Ruble had no direct contact with any of the KPMG clients who entered into the transactions.

All of the opinion letters issued by Ruble's firm stated specifically that they were predicated upon certain specific factual representations by the taxpayers, Presidio, and other parties involved in the transactions. These representations included statements that the investor in the transaction "believed there was a reasonable opportunity to earn a reasonable pre-tax profit from the transactions" and that "Presidio believed there was a reasonable opportunity for Investor to earn a reasonable pre-tax profit, in excess of all associated fees and costs, and without regard to any tax benefits that may occur, by participating in the [transaction]." All of the opinions issued by Ruble's law firm provided expressly that if any of the representations set forth therein was inaccurate in any material respect, then the opinions "may not be relied upon."

The specific counts of tax evasion on which Ruble was convicted all pertained to a particular transaction, known by the acronym "BLIPS". In late 1998 and early 1999, KPMG and Presidio, along with Ruble and other tax lawyers, began working on the design of the transaction that came to be known as BLIPS. The "basis shift" aspect of the BLIPS transaction involved having taxpayer-controlled entities enter into large premium loans, generally through Deutsche Bank. These loans were to be coupled with an investment program that was to carry the potential of generating a non-tax economic profit.

In early 1999, Presidio brought on a new partner, Amir Makov ("Makov") to design the investment program that would be part of the BLIPS transactions. Makov had stellar academic and occupational credentials as a trader, investment adviser, and an expert in foreign currencies and derivatives trading. Makov designed an investment program involving investments in forward contracts in foreign currencies that are "pegged" to the U.S. dollar, specifically, the Argentine Peso and the Hong Kong Dollar. These investments carried the potential of generating a very large profit in a short period of time. Pegged currencies tend to maintain an artificially high exchange rate. When the currencies become "de-pegged" or when the peg "breaks", the currencies generally devalue by a very large amount in a very short period of time. An investment in forward contracts in such currencies therefore could be extremely profitable, depending upon the timing of the breaking of the peg.

Ruble was not told by Makov or anyone else that the BLIPS transactions did not have a "reasonable possibility" of generating an economic profit based on the

currency transactions Makov designed. On the contrary, as described above, both Presidio and the taxpayers themselves consistently represented to Ruble that the transactions did have the potential to generate economic non-tax profits.

District Court Proceedings

Ruble and eighteen other defendants were indicted for various tax offenses. On July 16, 2007 the District Court dismissed the Indictment with respect to thirteen of the defendants who had been employed by KPMG, based on the government's violation of those defendants' Sixth Amendment right to counsel. *United States v. Stein*, 495 F.Supp.2d 390 (S.D.N.Y. 2007). On an appeal by the government, the Second Circuit affirmed the dismissal of the indictment as to those defendants. *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008).

Trial as to the remaining defendants and counts commenced on October 14, 2008. As described above, the government's argument was that the BLIPS transaction lacked "economic substance" and therefore could not give rise to valid tax benefits. In instructing the jury on this issue, the District Court declined to follow the jury charges that had previously been approved in the Second Circuit in criminal tax cases in which the economic substance issue had arisen. *United States v. Atkins*, 869 F.2d 135, 139-140 (2d Cir.), *cert. denied*, 493 U.S. 818 (1989); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 98 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983); *United States v. Regan*, 937 F.2d 823, 828 (2d Cir. 1991). Under these instructions, a transaction will be deemed to lack economic substance for criminal tax purposes if it has

no purpose other than the creation of a tax deduction, if it has no possibility of generating an economic profit, if it was subject to no market risk, and if it had no economic significance independent of tax consequences.

Instead of following these approved instructions applicable to criminal tax cases, the District Court looked to the tangled mess of civil tax caselaw, in which courts have struggled, inconsistently and unsuccessfully, to come up with a comprehensible definition of economic substance. The District Court thus came up with its own instructions, which set forth both "subjective" and "objective" components to the concept of economic substance, charging the jury that a transaction would lack economic substance if the taxpayer subjectively had no non-tax purpose for entering into the transaction, giving several inappropriate examples illustrating how the jury might make such a determination about a taxpayer's subjective purposes (most taxpayers did not testify at the trial, compounding the problem of determining their subjective purposes), and if objectively the transaction lacked a "reasonable" possibility of making an economic profit. The terms "reasonable possibility" were undefined.

On December 17, 2008, based on the foregoing instructions, the jury returned a verdict as to Ruble of guilty on ten counts of tax evasion. All of the counts of tax evasion on which Ruble was convicted involved the BLIPS transaction.

On February 5, 2009, Ruble moved for judgment of acquittal pursuant to Fed.R.Crim.P. 29(c). On April 1, 2009, the District Court orally denied Ruble's motion for judgment of acquittal, and the District Court entered a

written decision denying Ruble's motion on April 2, 2009. *United States v. Ruble*, 2009 WL 911035 (S.D.N.Y. April 2, 2009). The District Court expressly found that Ruble's case presented substantial issues for appellate review, and granted Ruble bail pending appeal.

Proceedings in the Second Circuit

The Second Circuit affirmed by summary order Ruble's conviction, as well as those of Larson and Pfaff. The Second Circuit upheld the District Court's deviation from prior caselaw setting forth the appropriate instructions in criminal tax cases in which the doctrine of economic substance is at issue and instead relying on the vague definition derived from civil tax law. The Second Circuit stated that its decisions in prior criminal tax cases do not define the "outer limits" of the economic substance doctrine, but offered no guidance as to where those "outer limits" might be found.

The Second Circuit further found that vagueness in the doctrine of economic substance did not foreclose a criminal tax conviction in this case. However, since a criminal tax conviction requires proof of willfulness, which this Court has defined as a "voluntary intentional violation of a *known* legal duty", *Cheek v. United States*, 498 U.S. 192, 201 (1991), the Second Circuit did not explain how, under this definition, criminal liability could possibly be sustained in a case where the "legal duty" is sufficiently vague so as to make it impossible as a matter of law for anyone to "know" what his or her legal duty is. The Second Circuit also upheld the government's expansive use of Section 7201 in this case.

As noted previously, the Second Circuit's initial summary order did not even mention the arguments Ruble had advanced that the government failed to establish that Ruble knew that the BLIPS transaction lacked economic substance, no matter how that term is defined. After Ruble moved for rehearing, the Second Circuit issued an amended summary order which inserted a brief paragraph holding without detailed explanation that the proof of Ruble's guilt was sufficient.

REASONS FOR GRANTING THE WRIT

The reasons for granting review in this case are set forth at length in the petition of Larson and Pfaff. The Court's attention is respectfully invited to that petition.

1. The doctrine of "economic substance" as applied in tax cases is an anomaly. It is not a canon of statutory construction. It is not an interpretive device that can be used to effectuate Congressional intent. Rather, the economic substance doctrine is a judicially-created additional element that the Internal Revenue Service and courts apply – inconsistently – to amplify the technical requirements Congress established to govern questions of taxability under the Internal Revenue Code. In effect, what the economic substance doctrine does is to say that even though a transaction may be in full compliance with all of the technical requirements of the Internal Revenue Code to make the transaction eligible for a certain tax treatment, the Internal Revenue Service and the courts may nevertheless reach a different conclusion by holding that notwithstanding technical compliance with the statutory provisions of the tax laws as enacted by Congress, the vague concept of economic substance

mandates an outcome that differs from the outcome that would follow from mere statutory compliance.

Moreover, the economic substance doctrine as applied in tax cases is a one-way street. It is a doctrine that can be invoked only by one side in a tax controversy – the Internal Revenue Service. Unlike the Internal Revenue Service, taxpayers are held to technical compliance with the Internal Revenue Code. Thus, while the Internal Revenue Service can argue that notwithstanding technical compliance with the Code the tax treatment of a transaction can be altered because of a lack of economic substance, a taxpayer cannot argue the converse, namely, that even if a transaction did not comply with the technical requirements of the Code, it should nevertheless be granted the requested tax treatment because the substance of the transaction was consistent with the purposes of the tax law.

Thus, the economic substance doctrine in tax cases is unique in the law. The doctrine permits one party to a tax controversy to ignore the terms of the tax laws enacted by Congress by imposing an additional requirement – economic substance – not found in the statutes. Not surprisingly, the application of the doctrine in the caselaw is vague, inconsistent and confusing.

When the government seeks to import the economic substance doctrine into a criminal tax case such as this, formidable problems of unconstitutional vagueness arise. In the past, the Second Circuit attempted to avoid some of these issues by endorsing a limited definition of economic substance uniquely applicable to criminal tax cases. Under this standard, transactions would be deemed

lacking in economic substance only if the transaction had no possibility of generating an economic profit, had no market risk, and had no purpose other than the creation of tax benefits. *United States v. Atkins*, 869 F.2d 135, 139-140 (2d Cir.), *cert. denied*, 493 U.S. 818 (1989); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 98 (2d Cir.), *cert. denied*, 462 U.S. 1131 (1983); *United States v. Regan*, 937 F.2d 823, 828 (2d Cir. 1991). Here however, the District Court deviated from the path set down by these cases and instead looked to the confusing body of civil tax law to come up with a definition of economic substance. In doing so, the court placed the legal questions of unconstitutional vagueness and lack of willfulness as a matter of law squarely at issue in this case.

Where an issue of law is objectively vague and uncertain, it ought to follow that as a matter of law, criminal liability cannot be imposed for a violation of such a law since no one could possibly "know" that he or she has violated the law. *James v. United States*, 366 U.S. 213, 220-221 (1961). Nevertheless, the Second Circuit, without clear explanation, reached a contrary conclusion. The lower courts are sharply divided on the question of whether the objective vagueness of a particular law negates criminal liability as a matter of law. *United States v. Critzer*, 498 F.2d 1160 (4th Cir. 1974)(vacating conviction); *United States v. Mallas*, 762 F.2d 361 (4th Cir. 1985)(vacating conviction); *United States v. Harris*, 942 F.2d 1125 (7th Cir. 1991)(vacating conviction); *United States v. Dahlstrom*, 713 F.2d 1423 (9th Cir. 1983)(vacating conviction); *United States v. Heller*, 830 F.2d 150 (11th Cir. 1987)(vacating conviction); *United States v. Pirro*, 212 F.3d 86 (2d Cir. 2000)(striking portion of indictment based on vagueness of tax law); *United States v. Garber*,

607 F.2d 92 (5th Cir. 1979)(en banc)(treating vagueness as having both legal and factual components); *Atkins*, 869 F.2d 135 (affirming conviction based on narrow definition of economic substance); *Ingredient Technology Corp.*, 698 F.2d 88 (affirming conviction based on narrow definition of economic substance); *United States v. Curtis*, 782 F.2d 593 (6th Cir. 1986)(finding vagueness in the tax law irrelevant and affirming conviction).

Since this case squarely presents the issues that arise when the government seeks to apply the vague doctrine of economic substance in a criminal tax case, this Court should grant review to clarify the law on an issue that is of significant national importance to the fair administration of the tax laws.

2. The Court should also grant review with respect to the Second Circuit's virtually limitless interpretation of the tax evasion statute, 26 U.S.C. §7201. Historically, this statute has generally applied to taxpayers who willfully attempt to evade and defeat their own tax liabilities. Ruble, however, was convicted of evading the taxes of ten investors in the BLIPS transaction – people whom Ruble never even met. Ruble's role in this case largely consisted of drafting second opinion letters that KPMG provided to investors in the BLIPS transactions. Ruble had no role in preparing the actual tax returns of the taxpayers at issue, and he had no knowledge of the individual taxpayers' overall taxable income or deductions, other than as it pertained to BLIPS.

A charge under Section 7201 for conduct of this kind is unprecedented. This Court should grant review in order to clarify the law as to when a defendant's conduct is too

remote from a taxpayer's filing of false tax returns in order to render a defendant liable for criminal tax evasion under Section 7201.

3. The Court should also grant review with respect to the particular issues that arise in Ruble's case. There simply was no evidence at all that Ruble knew that the BLIPS transactions lacked economic substance, no matter how that term is defined. When dealing with a concept as vague and ill-defined as economic substance in the context of a criminal tax case, at the very least the government should be held to the highest standards of proof establishing a defendant's guilty knowledge. The government failed to do this in Ruble's case. Accordingly, the Court should also grant review of the particular issues raised by Ruble's conviction relating to his knowledge on the issue of economic substance, under any definition of that vague concept.

CONCLUSION

The petition of Ruble, as well as the petition filed by Larson and Pfaff, should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — AMENDED SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED OCTOBER 26, 2010

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AT A STATED TERM OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, HELD AT THE DANIEL PATRICK MOYNIHAN UNITED STATES COURTHOUSE, 500 PEARL STREET, IN THE CITY OF NEW YORK, ON THE 26TH DAY OF OCTOBER, TWO THOUSAND TEN.

PRESENT: DENNIS JACOBS,
Chief Judge,
RALPH K. WINTER,
JOSEPH M. McLAUGHLIN,
Circuit Judges.

United States of America,

Appellee,

-v.-

Robert Pfaff, Raymond J. Ruble, also known as R.J. Ruble, John Larson,

Defendants-Appellants.

09-1702-cr(L), 09-1707-cr(CON), 09-1790-cr(CON)

AMENDED SUMMARY ORDER

Appendix A

Appeal from a judgment of the United States District Court for the Southern District of New York (Kaplan, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Appellants' convictions and Larson's term of imprisonment be **AFFIRMED.**

Raymond Ruble, Robert Pfaff, and John Larson appeal from judgments of conviction and a sentence entered April 15, April 21, and April 24, 2009, respectively, in the United States District Court for the Southern District of New York (Kaplan, *J.*). Appellants were convicted of tax evasion, and sentenced principally to terms of imprisonment and fines. In a separate *per curiam* opinion filed today, we decide the challenge to Larson's fine, imposed under 18 U.S.C. § 3571(d). We assume the parties' familiarity with the underlying facts and the case's procedural history.

Appellants raise five issues here: [1] whether the jury instructions were flawed; [2] whether the evidence was sufficient to support their convictions; [3] whether the government's case at trial constructively amended the indictment; [4] whether they are entitled to have their indictments dismissed pursuant to *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008); and [5] whether the district court erred in imposing Larson's sentence. The issues are considered *seriatim*.

[1] We find no error in the district court's jury instructions. "We review jury instructions de novo, and reverse only when the charge, viewed as a whole,

constitutes prejudicial error." *United States v. Amato*, 540 F.3d 153, 164 (2d Cir. 2008). The district court charged the jury that a transaction lacks non-tax economic effect when there is "no reasonable possibility that the transaction would result in a profit." On the facts of this case (where the non-tax economic effect proffered by the defense was the possibility of profit), that was a correct statement of the law. *See, e.g., Goldstein v. Commissioner*, 364 F.2d 734, 740 (2d Cir. 1966) (disallowing "deduction for [transactions] that can not *with reason* be said to have purpose, substance, or utility apart from their anticipated tax consequences," in case where taxpayer could have realized a $22,875 profit given favorable market changes (emphasis added)). We have in the past affirmed jury instructions stating a narrower definition. *See, e.g., United States v. Atkins*, 869 F.2d 135, 140 (2d Cir. 1989) (approving instruction that transaction has no non-tax economic effect if it is "subject to no market risk"). But we have not held that those instructions state the outer limits of the economic substance doctrine. Nor do we find any error in the district court's circumstantial evidence examples, which were, if anything, favorable to the defense.

[2] The evidence was sufficient to support the convictions. When reviewing a conviction for sufficiency of evidentiary support, "the trial evidence is viewed most favorably for the Government" and "all reasonable inferences a jury may have drawn favoring the Government must be credited." *United States v. Wexler*, 522 F.3d 194, 206-07 (2d Cir. 2008). We affirm "'if any rational trier of fact could have found the essential elements of [the] crime beyond a reasonable doubt.'" *Id.* at 207 (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

There is sufficient evidence that the transaction lacked any non-tax economic effect. Testimony described the chances of profiting from the investments as "basically zero."

Sufficient evidence also supports the jury's finding that the transactions were entirely motivated by tax purposes. Clients testified that the transactions were marketed solely as tax-avoidance schemes, and that, as clients, they had no non-tax business purpose in executing them. Evidently, that is why, at the outset of the purportedly seven-year scheme, a good number of BLIPS clients attempted to limit their commitment to sixty days, even though exiting so early would significantly limit their (already nugatory) chances of profiting on the currency forwards. BLIPS was designed, marketed, and executed as a tax shelter; and the jury was warranted in concluding that all parties knew BLIPS's profit potential to be nothing more than a pretext.

In a challenge to the finding of willfulness, Appellants argue that "economic substance" law was too vague to support their convictions. Citing *United States v. Pirro*, 212 F.3d 86, 91 (2d Cir. 2000), Appellants contend that economic substance law was not sufficiently "knowable." But "knowability," except perhaps as probative of a defendant's subjective belief in the lawfulness of his conduct, is only relevant insofar as it bears on constitutional vagueness. Vagueness of the law does not *ipso facto* negate a jury finding of willfulness. *See United States v. Ingredient Tech. Corp.*, 698 F.2d 88, 97 (2d Cir. 1983). And economic substance law is not unconstitutionally vague: It has been applied in criminal cases before, and (as discussed) is not unsettled in the way Appellants contend. *Cf. Pirro*, 212

F.3d at 91 (affirming partial dismissal of an indictment insofar as it charged a violation of a purported legal duty the existence of which was an open question).

In addition, sufficient evidence was presented to the jury to support its finding that Ruble either knew or consciously avoided knowing that the taxpayers lacked a non-tax business purpose for engaging in the transaction, and that there was no reasonable possibility that the transaction would yield a profit. As discussed above, Ruble was aware that the investors had no reasonable expectation of a profit unless they remained invested for the long term, and that most of the investors had exited the deals within sixty days. Moreover, the jury was free to infer that Ruble knew that the transaction had no business purpose based on his close relationship with Pfaff and Larson.

Finally, we disagree that Appellants' actions fall outside the ambit of the tax evasion statute, 26 U.S.C. § 7201. Section 7201 provides, in relevant part:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony.

The statute's expansive language is not susceptible to a limitation that would exclude Appellants. No case interpreting § 7201 appears to have adopted any limit to its reach; those cases that have considered § 7201's scope have rather expressed it expansively, *see, e.g.*, *United States v. Townsend*, 31 F.3d 262, 267 (5th Cir. 1994)

("[Section] 7201 is not limited to prosecutions of those who evade taxes that they may owe themselves, but rather it encompasses prosecutions of any person who attempts to evade the tax of anyone."). Appellants involved themselves, with the requisite intent, in a scheme to avoid taxes, and we see no statutory basis for excluding them from liability under § 7201.

[3] Appellants' argument concerning constructive amendment is reviewed *de novo*. *United States v. Rigas*, 490 F.3d 208, 225 (2d Cir. 2007). They argue that the government undertook to prove at trial a conspiracy of the Appellants *against* KPMG, rather than the charged conspiracy *with* KPMG. But Appellants were acquitted of conspiracy. Constructive amendment of the conspiracy charge would have warranted vacatur of that charge only; the remainder of the indictment would have stood. *See United States v. Milstein*, 401 F.3d 53, 64-66 (2d Cir. 2005) (per curiam) (vacating conviction on one count for constructive amendment of indictment with respect to that count, and rejecting argument that the constructive amendment warranted vacatur of convictions on other counts). Because no Appellant was convicted of conspiracy, we would be unable to afford relief even if we were to find error.

[4] The district court found that KPMG would not have paid Pfaff's and Larson's legal fees in this case, and that dismissal under our decision in *Stein* was therefore unwarranted. We review this finding for clear error. *Stein*, 541 F.3d at 142, 146. Pfaff and Larson point to a number of facts that they claim demonstrate the clear error of the

district court's finding, none persuasive. Most strongly emphasized are three pieces of evidence.

First is a 2004 statement by KPMG then-CEO Gene O'Kelly that "[a]ny present *or former* members of the firm asked to appear will be represented by competent coun[se]l *at the firm's expense*." *United States v. Stein*, 495 F. Supp. 2d 390, 407 (S.D.N.Y. 2007) (first emphasis added). But this statement speaks not at all to what conduct the promise covers, and is therefore of limited independent value. Pfaff and Larson note that some of their indicted conduct occurred while they were at KPMG; but that conduct was minimal relative to the indicted conduct after they left. There is no direct evidence that KPMG considered such a small proportion to be enough, and it was reasonable for the district court to infer in the circumstances that KPMG would not have paid Pfaff's and Larson's fees, given the incentives driving fee payment in the first place, *see Stein*, 541 F.3d at 144 ("[A] firm may have potent incentives to advance fees, such as the ability to recruit and retain skilled professionals in a profession fraught with legal risk.").

Second, Pfaff and Larson compare their situation to that of Gregg Richie, whose attorney's fees, the district court found, would have been paid by KPMG. However, in contrast to Pfaff and Larson, Ritchie had little involvement with BLIPS after leaving KPMG. Ritchie's relevant conduct post-KPMG appears to constitute only a small part of his involvement with BLIPS, as compared with his role as head of KPMG's CaTs ("Capital Transaction Strategies") group--"[t]he KPMG group focused on

designing, marketing, and implementing tax shelters for individual clients."

Finally, Pfaff and Larson point to KPMG's payment of their legal fees in the *Perez v. KPMG* civil case, which they contend demonstrated KPMG's willingness to pay their legal fees in connection with legal proceedings arising from BLIPS. But the *Perez* case involved conduct undertaken entirely during Pfaff's and Larson's employment at KPMG, *see* Notice of Removal at 25-37, *Perez v. KPMG*, No. 7:03-cv-00026 (S.D. Tex. Jan. 24, 2003); and is therefore distinguishable on the lines discussed.

[5] Larson argues that his term of imprisonment is impermissibly longer than the sentences imposed on other defendants. We review sentencing decisions for "reasonableness," employing "the familiar abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 46 (2007). As Larson contends, the district court relied on the defendants' ages, observing that any lengthy sentence "would be a life sentence without parole for all these men." Since Larson is just 13 months younger than Pfaff, it would have been questionable to rely on this factor alone to justify a sentence disparity. But the district court stated that age was merely one of the factors justifying the difference. The district court properly relied on the fact that Larson moved assets abroad in order to protect them from creditors and from the government. *See* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the

United States may receive and consider for the purpose of imposing an appropriate sentence.").

In a separate *per curiam* opinion filed today, we decide the challenge to Larson's fine, imposed under 18 U.S.C. § 3571(d). Finding no merit in Appellants' remaining arguments, we accordingly **AFFIRM** Appellants' convictions and Larson's term of imprisonment.

FOR THE COURT:

/s/

CATHERINE O'HAGAN WOLFE, CLERK